

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
PANAMA CITY DIVISION**

**RAMON ARMAS BORROTO, JR.,**

**Plaintiff,**

**vs.**

**Case No. 5:04cv165-RH/WCS**

**OFFICER McDONALD, et al.,**

**Defendants.**

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**REPORT AND RECOMMENDATION**

Defendants filed a motion to dismiss in which they assert that Plaintiff did not exhaust administrative remedies. Doc. 24. Plaintiff filed a response to that motion challenging Defendants' assertion. Doc. 29. Plaintiff asserted that he filed an emergency grievance directly to the Secretary, log number 02-12025, and that although the subject was improperly listed as "discipline," it was his grievance concerning the alleged abuse at issue in this case because he did not submit any other grievances during that period of time. *Id.* Based on Plaintiff's argument, Defendants were directed to provide a copy of the identified grievance appeal. Doc. 32. Defendants have responded and filed a copy of a grievance. Doc. 33.

The grievance is the one identified by Plaintiff as grievance number 02-12025. Doc. 33, ex. A. Review of that grievance reveals that it is not about the subject matter of this civil rights action (physical abuse), but about Plaintiff's assertion that officials at Washington C.I. were improperly "carrying over disciplinary confinement time that was assessed prior to [Plaintiff's] placement on Close Management." *Id.* The grievance was ultimately rejected because Plaintiff was not authorized to by-pass the informal grievance step. *Id.*

Since passage of the PLRA, 42 U.S.C. § 1997e(a) provides: "*No action shall be brought* with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." (Emphasis added.) The exhaustion requirement of § 1997e(a) is mandatory, whether the claim is brought pursuant to § 1983 or Bivens. Alexander v. Hawk, 159 F.3d 1321, 1324-26 (11th Cir. 1998). There is no discretion to waive this requirement or provide continuances of prisoner litigation in the event that a claim has not been exhausted prior to filing. Alexander, 159 F.3d at 1325; *see also* Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002) (holding that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."); Higginbottom v. Carter, 223 F.3d 1259, 1260-61 (11th Cir. 2000) (holding that an excessive force claim is subject to the exhaustion requirement). Furthermore, this Court may not consider the adequacy or futility of administrative remedies, but only the availability of such. Higginbottom, 223 F.3d at 1261, *citing* Alexander, 159 F.3d at

1323. Even where an inmate seeks only monetary damages in a civil rights case, he must complete the prison administrative process if it could provide some sort of relief on the complaint although no money could be given administratively. Booth v. Churner, 531 U.S. 956, 121 S. Ct. 1819, 1821, 149 L. Ed. 2d 958 (2001).

A prisoner must, however, comply with the process set forth and established by the grievance procedures. See Miller v. Tanner, 196 F.3d 1190, 1193 (11th Cir. 1999). Even if a grievance is initially denied as untimely, a prisoner must appeal the denial of his grievance. See Harper v. Jenkin, 179 F.3d 1311 (11th Cir. 1999)(noting Georgia's inmate grievance procedures allow "the grievance coordinator to waive the time period for filing a grievance if 'good cause' is shown"). Failure to exhaust available administrative remedies is the functional equivalent of failing to state a claim, and thus should be counted as a strike under 28 U.S.C. § 1915(g). See Rivera v. Allin, 144 F.3d 719, 731 (11th Cir.), *cert. denied* 524 U.S. 978 (1998) (stating that "[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted."). "Accordingly, we join other circuits in concluding that under section 1915(g), federal courts may properly count as strikes lawsuits or appeals dismissed as frivolous, malicious or failing to state a claim upon which relief may be granted prior to April 26, 1996." Rivera, 144 F.3d at 730(citations omitted).

In this case, Plaintiff alleged that Defendants violated his rights when they physically abused him. Plaintiff has not, however, demonstrated exhaustion of that claim. Plaintiff's failure to exhaust available administrative remedies prior to filing this

cause of action regarding prison conditions mandates dismissal of the complaint without prejudice.

In light of the foregoing, it is respectfully **RECOMMENDED** that Defendants' motion to dismiss, doc. 24, be **GRANTED**, that Plaintiff's amended complaint, doc. 19, be **DISMISSED** for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997(e) and for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2), and that the order adopting this report and recommendation direct the Clerk of Court to note on the docket that this cause was dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

**IN CHAMBERS** at Tallahassee, Florida, on March 17, 2005.

s/ William C. Sherrill, Jr.  
**WILLIAM C. SHERRILL, JR.**  
**UNITED STATES MAGISTRATE JUDGE**

**NOTICE TO THE PARTIES**

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.